

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ADOBE WHITEWATER CLUB OF
NEW MEXICO, a non-profit
corporation, NEW MEXICO
WILDLIFE FEDERATION, a non-
profit corporation, and NEW MEXICO
CHAPTER OF BACKCOUNTRY
HUNTERS & ANGLERS, a non-profit
organization,

Petitioners,

vs.

No. S-1-SC-38195

HONORABLE, MICHELLE LUJAN
GRISHAM, Governor, and STATE
GAME COMMISSION,

Respondents.

**SENATOR TOM UDALL AND SENATOR MARTIN
HEINRICH'S UNOPPOSED MOTION FOR LEAVE TO FILE
A MEMORANDUM BRIEF AS AMICI CURIAE**

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United States Senators Tom Udall and Martin Heinrich have followed with concern efforts that undermine New Mexicans' right under the state constitution to access streams and watercourses. *See* N.M. Const., art. 16, § 2; *State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC-034, ¶ 48, 51 N.M. 207 (under Section 2, Article 16 of the New Mexico Constitution, even "small streams of the state are fishing streams to which the public have a right to resort so long as they do not trespass on the private property along the banks"). This proceeding provides the Court an opportunity to enforce the public's longstanding right of access, and Senators Udall and Heinrich seek leave under Rule 12-320(E) NMRA to file an amicus brief in support of that result.¹

As lifelong conservationists and public lands advocates, Senators Udall and Heinrich have a unique appreciation of the importance of public lands to New Mexico and across the nation, and the harm New Mexico and its people would suffer if the state abandoned its rule protecting the public's right to enjoy these most treasured natural resources. They also have closely considered the particular danger of replacing the current rule, firmly grounded in New Mexico's history and Constitution, with a new regime under which access would be determined based on federal "navigability" standards and title to streambeds. Senators Udall and

¹ Pursuant to Rule 12-320(C) NMRA, the undersigned states that no counsel for a party or a party made any monetary contribution intended to fund the preparation or submission of this brief.

Heinrich believe that, drawing on their experience and knowledge, they can assist the Court by addressing in an amicus brief relevant matters the parties have not covered.

Given the importance of the issue this proceeding raises, Senators Udall and Heinrich ask that the Court allow them to participate as amici and file their amicus brief within seven days of the date the Court enters an order on this motion. *See* Rule 12-320(A) (“The brief shall be conditionally filed with the motion for leave, unless otherwise ordered by the Court.”). Petitioners and Respondents’ counsel have been contacted, and they do not oppose this motion. Respondents’ briefs were filed April 20, 2020, Petitioners are seeking leave to file a reply brief, and Additional Respondents (landowners and various organizations) also have a pending request for leave to participate in this action. Allowing Senators Udall and Heinrich to proceed on this schedule will therefore not prejudice any party or cause undue delay.

Amici’s Statement of Interest

Senator Udall and Senator Heinrich’s interest in this case ties directly to their joint efforts to advance conservation and public lands issues over years of public service. The Senators were instrumental in the 2013 designation of Rio Grande del Norte National Monument, giving protected status to over 240,000 acres of rugged and stunning land in northern New Mexico that includes the “wild

and scenic” portions of the Rio Grande and Red River. *See* Proclamation No. 8946, 3 C.F.R. § 8946; Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271 et seq. They also were driving forces in the 2014 designation of Organ Mountains-Desert Peaks as a national monument, protecting almost 500,000 acres in the starkly beautiful Chihuahuan Desert in southern New Mexico. *See* Proclamation No. 9131, 3 C.F.R. § 9131.

In 2019, Congress passed an historic public lands package that added millions of acres to our public lands. *See* Pub. L. 116-9. Senators Udall and Heinrich successfully championed provisions that gained permanent wilderness status for the Cerro del Yuta and Rio San Antonio Wilderness Areas within Rio Grande del Norte National Monument and 10 areas within Organ Mountains-Desert Peaks comprising approximately 240,000 acres, created the Ah-shi-sle-pah Wilderness Area, and expanded the Bisti-De-Na-Zin Wilderness. *Id.* §§1202, 1201, 1121; *see* Wilderness Act, 16 U.S.C. 1131 §§ et seq.

Together, the Senators helped secure the future of Valles Caldera National Preserve through transfer of jurisdiction from a trust to the National Park Service in 2014. Pub. L 113-291, § 3043. Also in 2014, they shepherded designation of the Columbine-Hondo Wilderness, Pub. L. 113-291. In 2017, they succeeded in unlocking public access to the Sabinoso Wilderness, previously surrounded by

private lands, by convincing the U.S. Interior Department to accept a land donation allowing access.

Both Senators played lead roles in securing permanent authorization of the Land and Water Conservation Fund (LWCF) in the 2019 public lands package. Pub. L. 116-9, § 3001. The LWCF protects special places and ensures recreation access for fishing, hunting, and other outdoor activities. Over the past 50 years, the LWCF has funded over \$300 million worth of conservation around New Mexico for the benefit of the public, access to which could also be significantly impacted by the outcome of this case. Both Senators are now working to secure full funding for LWCF.

Senators Udall and Heinrich are working to address the maintenance backlog at our national parks, and invest in the infrastructure that improves access and visitor experience at all of our public lands. Both have worked to hold the U.S. Air Force accountable for cleaning up groundwater contamination at bases in New Mexico. They are now working on legislation that would designate hundreds of miles of the headwaters of the Gila River as wild and scenic.

Beyond these joint efforts, Senator Udall and Senator Heinrich individually have been devoted to conservation and public lands issues throughout their careers, and their individual interests are addressed below.

Senator Tom Udall

Tom Udall served as New Mexico Attorney General from 1991 through 1998, as U.S. Representative from New Mexico's Third Congressional District from 1999 through 2008, and as U.S. Senator from New Mexico since 2009. Throughout his nearly three decades in public office, Senator Udall has been a strong, effective, and outspoken conservationist and public lands advocate.

Prior to holding office, Senator Udall was part of a coalition that worked successfully for congressional designation of stretches of the Rio Chama as "wild and scenic" in 1988. Pub. L. 100-568. The parties' briefs confirm that the Rio Chama will be directly impacted by this case.

As Attorney General, Senator Udall issued a seminal opinion affirming that "instream flows" for recreational, fish and wildlife, and ecological use are entitled to legal protection as a valid water right. N.M. Atty. Gen. Op. 98-01 (Mar. 27, 1998). That opinion – based in part on the state constitutional provision at issue here – recognizes the value of leaving water in a streambed for recreational and aesthetic uses and for providing aquatic and riparian environments for fish and wildlife. He created the office's first environmental protection division, began an environmental crimes unit, and intervened in the initial proceedings to permit the Waste Isolation Pilot Plant to make sure the facility fully protects the environment and human health. He provided Congressional testimony five times during the

mid-1990's successfully opposing amendments that would have made it difficult for states to recover "natural resource damages" – damages to water, land, fish, wildlife, air, and other resource – under the Superfund law.

In Congress, Senator Udall serves as Ranking Member on the Senate Appropriations Subcommittee on Interior, Environment and Related Agencies that has jurisdiction over appropriations for the Interior Department, Environmental Protection Agency, and U.S Forest Service, among other agencies. As Ranking Member, Senator Udall has successfully steered funding to a wide swath of New Mexico's public lands and waters for the benefit of all New Mexicans, access to which could be significantly impacted by the outcome of this case.

Senator Udall is focused on protecting habitat and species from destruction, and recently introduced his Thirty by Thirty Resolution to Save Nature to protect 30 percent of the nation's lands and waters by 2030. S. 372, 116th Cong. (2020). And he's working to establish wildlife corridors on federal and tribal lands to preserve fish, wildlife, and habitat. S. 1499, 116th Cong. (2019); S. 2891, 116th Cong. (2019).

Senator Udall's connection to public lands is deeply personal. He grew up exploring public lands throughout the West. He's a fly-fisher, and has fished, kayaked, and rafted rivers throughout the West, including the Rio Grande, Rio Chama, and East Fork of the Jemez River, access to which could be severely

impacted by the outcome of this proceeding. He's hiked and backpacked in the Gila Wilderness, Rio Grande del Norte, Organ Mountains-Desert Peaks, Valles Caldera, among other public lands in the state. Today, he regularly hikes in the Santa Fe National Forest, right outside his backdoor.

Senator Martin Heinrich

As a lifelong conservationist, a former outfitter guide and an avid sportsman, Senator Martin Heinrich has long worked to protect and conserve New Mexico's public lands, watersheds, streams and wildlife for future generations.

Senator Heinrich knows the landscape of New Mexico intimately and keeps a mental map of the mountains and watersheds of the state in his mind, constantly updating it as he combines data from actual maps with his experiences on the ground and in, or on, the water. He has fished and hunted extensively throughout New Mexico and has personally kayaked, canoed and rafted most of the major rivers of the state.

Senator Heinrich is a champion for the outdoor recreation industry, which is a major economic driver in New Mexico, particularly in rural communities. He is a member of the Senate Energy and Natural Resources Committee, co-chair of the bipartisan Outdoor Recreation Caucus, a member of the Migratory Bird Commission, and co-chair of the Congressional Sportsmen's Caucus.

Protecting New Mexico's limited clean water resources is a paramount mission for Senator Heinrich. He has authored bipartisan legislation to restore the health of forests and watersheds. He has successfully secured millions of dollars of federal funds for New Mexico water projects such as the Navajo-Gallup Water Supply Project and the Eastern New Mexico Rural Water Supply Project. He has also fought against the Trump administration's rollbacks of key protections against pollution of our clean water supplies.

Last year, Senator Heinrich passed a law to establish White Sands National Park. He also played a leading role in the passage of a landmark bipartisan public lands legislative package that established 13 new wilderness areas in New Mexico. That law included Senator Heinrich's Every Kid Outdoors Act – which provides America's fourth graders and their families free entrance to America's public lands, waters, and historic sites. And he passed into law provisions of the Sportsmen's Act, including the HUNT Act, a bill he first introduced when he was in the U.S. House of Representatives to improve access to public lands wherever hunting, fishing, and outdoor recreation are permitted.

Senator Heinrich played a key role in establishing the 570-acre Valle de Oro National Wildlife Refuge in Albuquerque's South Valley, the Southwest's first urban wildlife refuge. He also led the effort to establish the Manhattan Project

National Historical Park and is now leading the effort to make northern New Mexico's Bandelier National Monument a full-fledged national park.

Prior to being elected to the U.S. Senate, Heinrich served two terms in the U.S. House of Representatives and served four years as an Albuquerque City Councilor. Early in his career, Senator Heinrich served in AmeriCorps for the U.S. Fish and Wildlife Service and was the Executive Director of the Cottonwood Gulch Foundation, where he led youth educational wilderness expeditions and outdoor programs in the American Southwest. He also served as the State of New Mexico's Natural Resources Trustee working to conserve the state's outdoor heritage.

Conclusion

United States Senators Tom Udall and Martin Heinrich respectfully request the Court grant their Motion and permit them to file an amicus brief within seven days after the Court enters an order on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was submitted for e-filing and service through the District Court's "Odyssey File & Serve" filing system this 27th day of April, 2020, which caused counsel of record to be served by electronic means or as otherwise stated, as more fully reflected on the Notification of Service.

PEIFER, HANSON, MULLINS & BAKER, P.A.

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